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In the Supreme Court of the United States

OCTOBER TERM 1966

No. 1064

STOCKTON PORT DISTRICT,

Petitioner,

vs.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, PACIFIC WESTBOUND CONFERENCE, PACIFIC / STRAITS CONFERENCE, PACIFIC/INDONESIAN CONFERENCE, and Their Respective Member Lines, and STATE OF CALIFORNIA,

Respondents.

Brief of Respondent Pacific Westbound Conference in Opposition to Petition for Writ of Certiorari

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All emphasis supplied.

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I.

STATEMENT OF THE CASE

This respondent does not dispute that this Court has jurisdiction and that the petition is timely.

Respondent Pacific Westbound Conference (PWC) was the principal defendant in the complaint proceeding brought by the petitioner Stockton Port District before the Federal Maritime Commission. After extensive hearings a Commission Examiner upheld the validity of respondent's tariff

rule authorizing ocean carriers to equalize the difference in cost of inland transportation as between the ports located in the San Francisco Bay Harbor Complex so as to make the shipper's cost of overland transportation from his inland port of origin the same to any such port. The Commission concurred in the Examiner's decision and the Court of Appeals for the Ninth Circuit affirmed.

In proceedings before the Commission, Stockton claimed that cargo originating in inland points closer in "constructive mileage"[1] to Stockton than any other port on San Francisco Bay and its connecting waterways was its "exclusive preserve". Under its tariff rules, respondent ocean carriers absorb the difference in inland transportation costs between shipping to terminal ports located nearest to the shipper and the costs of shipping via the terminal port more distant from the shipper. Stockton asserted that, by virtue of equalization, it was deprived of cargo which would otherwise move over its docks and to which it was legally entitled.

Specifically Stockton claimed equalization was unjustly discriminatory, unfair and unduly prejudicial to it in violation of Sections 15 and 16 of the Shipping Act, 1916, as amended; contrary to Congressional policy expressed in Section 8 of the Merchant Marine Act, 1920, as amended; contrary to the public interest in violation of Section 15 of the Shipping Act, 1916, and unjustly discriminatory, unfair and unduly prejudicial as among shippers in violation of Sections 15 and 16 of the Shipping Act, 1916.

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1. The Commission defined "constructive mileage" in Footnote 6, R. 1279, as follows:

> "6. Constructive mileage is actual mileage weighed by such factors as the number of traffic lights and bridges, the presence or absence of mountainous terrain, the condition of the highways and other factors affecting truck traffic."

On the basis of extensive and, in part, conflicting evidence the Commission adopted findings of fact as found by the Examiner:

All ports on San Francisco Bay and its connecting waterways, served via the Golden Gate, are part of one "San Francisco Bay Harbor Complex" and within the same geographical area. (Examiner, R. 1245; Commission, R. 1277.)

All San Francisco Bay Harbor Complex ports naturally serve the same inland geographical area; that the "territory naturally tributary to Stockton should properly be considered naturally tributary to San Francisco and other San Francisco Bay Area ports". (Examiner, R. 1250; Commission, R. 1281.)

Having made these findings of fact, the Commission resolved the mixed question of fact and law regarding the alleged unjust discrimination to Stockton in violation of Sections 15 and 16 of the Shipping Act, 1916. In so doing the Commission specifically considered the Congressional policy reflected in Section 8 of the Merchant Marine Act, 1920, and its own prior decisions. These conclusions were essentially the same as those of the Examiner.

The Commission rejected Stockton's contention that it had any exclusive claim to cargo originating in areas closest to it based on Stockton's constructive mileage theories or otherwise, concluding that the equalization complained of is not unlawful. (Examiner, R. 1250; Commission, R. 1279.)

The Commission further concluded that equalization does not deprive Stockton of any cargo which was exclusively and naturally tributary to Stockton and that equalization was therefore not unjustly discriminatory or unfair, or unduly prejudicial to Stockton in violation of the Shipping Act, 1916, or in violation of any Congressional policy. (Examiner, R. 1250-51; Commission, R. 1278-81.) Contrary to Stockton's contentions (Pet., pp. 5, 7, 12, 13), this conclusion

did not rest upon the benefits to shippers and carriers resulting from equalization. (R. 1279).

The Commission also concluded that equalization is not unjustly discriminatory or unfair as between shippers, or contrary to the public interest. In this connection the Commission recognized the public interest to be larger than the needs or desires of the Stockton area and found equalization "reflects an overall economic good, tangible benefit to the public at large, and an important transportation justification." (Examiner, R. 1254; Commission, R. 1285)

Stockton's claims were rejected by the Examiner and by the Commission which confirmed without material change the Examiner's findings and conclusions. Stockton renewed its claims in all respects material here before the court of appeals. After characterising the Commission's findings and conclusions as "complete and elaborate", the court held: "(They) do have warrant in the record, a reasonable basis in law, and are supported by substantial evidence." (R. Vol. 1, p. 6)

II.

THE QUESTION PRESENTED

The issues raised by petitioner before the Commission and to the court of appeals were questions of fact or mixed questions of fact and law. The only question presented by this petition is whether the determinations made by the Commission based on findings of fact and on resolution of mixed questions of fact and law, have a reasonable basis in law and are supported by substantial evidence.

III.

ARGUMENT

A. The Limited Scope of Judicial Review.

Petitioner agrees that in denying Stockton's petition for review, the court of appeals did not pass upon or consider

its contention that "port equalization violated the policy and intent of Congress as set forth in various statutes and certain action of Congress" (Pet. p. 6). The sole function of the court of appeals was to review the agency decision within the accepted standards for review. This it did.

The court of appeals stated:

> ". . . the very complete and elaborate decision of the Maritime Commission discloses that its conclusions do have warrant in the record, a reasonable basis in law,[2] and are supported by substantial evidence" (R. Vol. 1, p. 6).

It has long been true that upon review of an administrative decision, the question before the court is a limited one; namely, whether the decision has reasonable support in the record and in the applicable law. The court is not at liberty to substitute its judgment or discretion for that of the agency. This Court recently has had occasion to explain the reason for such limitations as follows:

> "Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute."
>
> *Consolo v. Federal Maritime Commission*, 383 U.S. 607 at 620 (1966). (Footnote omitted).[3]

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2. The phrase "a reasonable basis in law" was adopted from the decision of this Court in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 at 131 (1944).

3. The reliance by the court of appeals upon *Consolo* and *Trans-Pacific Freight Conference of Japan v. Federal Maritime Comm'n*, 314 F.2d 928 (9th Cir. 1963), is criticized by petitioner which asserts the cases are not in point because they involved only questions of fact. We need not argue the matter as to whether only factual questions were involved in those cases. The principles are firmly established and manifestly applicable where, as here, there are questions of fact and mixed questions of fact and law.

Whether or not respondent's tariff rule providing for equalization is valid is a matter to be determined by the Commission in the first instance. Here that determination is one based upon facts and mixed questions of fact and law. Its determination cannot be disturbed except upon a finding that the facts found do not have warrant in the record and no reasonable basis in the law. The deference given by the courts to the administrative agency in fashioning policy pursuant to the statutes which it administers should be observed here. Petitioner presents no issue calling for substitution of the court's discretion for that of the Commission.

B. The Policy of Section 8 Was Not Ignored Below.

The principal contention of the petition is that the Commission based its conclusion that equalization is not unjustly discriminatory or prejudicial to Stockton upon the benefits accruing to shippers and carriers (Pet. pp. 5, 7, 12, 13), thus ignoring Congressional policy as set forth in Section 8 of the Merchant Marine Act, 1920, which petitioner interprets as requiring that the sole consideration be the benefit or detriment to ports. (Pet. pp. 7-13). This position (1) misstates the basis of the Commission's decision, (2) ignores the not insubstantial part of the Commission's decision interpreting and applying Congressional policy, (3) misinterprets Section 8 and (4) even if correctly stated would not call for court interference with agency discretion.

That the Commission's conclusion that the equalization is not unjustly discriminatory or prejudicial to Stockton was not based upon the benefits accruing to shippers and carriers is readily demonstrated. After discussing the benefits accruing to carriers and shippers from, and the effect upon ports of, equalization, the Commission stated:

"Thus, there is ample economic and cost justification for the discrimination against Stockton such as it is. *But even this would not save respondents' equalization* under the applicable precedents were it established that the practice drew cargo away from territory which was exclusively and naturally tributary to Stockton." (R. 1279)[4]

The basis for the Commission's conclusion was facts found and determinations made of mixed questions of fact and law to the effect that Stockton had no exclusive right to cargoes it claimed for itself. These findings are based on economics, history and the geography of the San Francisco Bay Harbor Complex ports.

Even if, however, the Commission had based its decision respecting the lack of unjust or undue disadvantage to Stockton by considering the benefits to shippers, carriers and to the public interest, there would be no sound basis for rejecting such determination. As Commissioner Patterson observed in his concurring opinion, as long as the purpose and effect of the equalization rule is to the mutual advantage of shippers and carriers, the ports and localities are not "unreasonably" disadvantaged by equalization within the language of the Shipping Act, 1016[5] (R. 1316-1317). Whether any alleged discrimination or disadvantage suffered by Stockton is unreasonable obviously turns on a determination of facts, a function committed by Congress

4. The Commission did hold *invalid* equalization between Bay Area ports and Los Angeles and Long Beach on citrus fruit originating in Southern California. Los Angeles was not a part of the same geographical area as San Francisco and this equalization practice accordingly did draw cargo "naturally tributary" to a port away from it. (R. 1291). Significantly, the fact that this equalization was also beneficial to the carriers and shippers did not save it from being held invalid.

5. Section 15 (46 U.S.C. 814) and Section 16 (46 U.S.C. 815).

to the expertise of the Federal Maritime Commission (*Alcoa Steamship Company v. Federal Maritime Commission*, 321 F.2d 756, 759 (D.C. Cir. 1963); see also *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297 (1937)).

Petitioner charges that the Court of Appeals failed to consider whether Congressional policy and intent renders the equalization unlawful (Pet. p. 15). The policy referred to is that set forth in Section 8 of the Merchant Marine Act, 1920 (46 U.S.C. 867).[6] It should be observed at the

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6. For ready reference Section 8 of the Merchant Marine Act, 1920, is quoted in full:

"It shall be the duty of the Secretary of Commerce, in cooperation with the Secretary of the Army, with the object of *promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which he has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce;* to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investgate the subject of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view to devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate *any other matter that may tend to promote and encourage the use by vessels of ports adequate* to care for the freight which would *naturally pass through such ports:* PROVIDED, That if after such investigation the Secretary of Commerce shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges, rules, or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the Secretary may submit his findings to the Interstate Commerce Commission for such action as such

outset that notwithstanding the fact that the Commission's decision is replete with references to and consideration of the policy of Section 8 (R. 1275-78; 1280-81), no power, jurisdiction or duty is vested in the Commission with respect to the statute,[7] and in fact the concurring opinion of one of the Commissioners takes the other Commissioners to task for going beyond the Commission's functions and interpreting and applying Section 8 of the Merchant Marine Act, 1920 (R. 1306).

Section 8 is not in any event a statute which requires or compels any legal conclusion be drawn respecting equalization. Section 8, so far as here pertinent, places a duty on *the Secretary of Commerce* in cooperation with *the Secretary of the Army* "with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce . . . *to investigate* territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce . . ." and further, ". . . *to investigate* any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports. . . ." On its face,

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commission may consider proper under existing law. June 5, 1920, c. 250, § 8, 41 Stat. 992; Ex.Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 204, 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1276, 1277."

7. The Maritime Administration/Federal Maritime Board functions were separated by Reorganization Plan No. 7 of 1961 (46 U.S.C. A. § 1111 (Note)). Under the Plan all promotional functions remained with the Maritime Administration, Department of Commerce, including all functions performed with the Department of the Army under Section 8 of the 1920 Act, and all regulatory functions, principally those under the Shipping Act, 1916, were transferred to the new Federal Maritime Commission.

no duty is imposed even on the branches of the Government to whom the section is addressed *other than a duty to investigate.*

At the very most Section 8 expresses port promotional policies which the Federal Maritime Commission could (and did) in its discretion take into consideration in formulating its own policies under the Shipping Act, 1916. That is all that can be made of the *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 (1955), aff'd *sub nom. Pacific Far East Line, Inc. v. United States,* 246 F.2d 711 (D.C. Cir. 1957), on which petitioner relies so heavily (Pet., p. 10).

That case came before this Commission's predecessor, the Federal Maritime Board, which then had the duty and responsibility under Section 8 now vested in the Secretary of Commerce. The Court of Appeals there commented as to the Federal Maritime Board's treatment of the policies set forth in Section 8:

> "While we need not decide that this section (conferring the power to investigate) confers power to act to promote ports, it is indicative of a congressional policy favoring port improvement and development. That policy having been expressed, the Board *could,* if it was not bound to do so, examine the practices here complained of in the light of that policy, and *exercise its power* to approve or disapprove such practices accordingly. The Board did consider this policy in determining whether or not to approve equalization as practiced by the Conference." (246 F.2d at 716)

As the Board did in *City of Portland v. Pacific Westbound Conference, supra,* the Federal Maritime Commission here, though clearly having no duty under the statute, also considered and applied the policies of Section 8.

It pointed out:

> "In seeking to bring itself within the protection of section 8 of the 1920 Act, Stockton relies on its physi-

cal separation from San Francisco Bay proper. But other factors must be considered in making determinations under section 8. Thus, the 'economies of transportation' and the 'natural flow of commerce' are relevant:

> '. . . section [8] requires, all other factors being substantially equal, that a given geographical area and its ports receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area. (*City of Portland v. Pacific Westbound*, 4 F.M.B. 664.)' " (R. 1277)

It agreed with the Examiner's conclusion that

> ". . . the ports of Stockton and San Francisco do not represent separate and distinct geographical areas. They are both 'bay area' ports and have been uniformly treated as such for a variety of purposes." (R. 1277)

It considered, in the words of Section 8, "the natural direction of the flow of traffic" and concluded upon examination of the complex factual background that "The natural direction of the flow of traffic from the San Joaquin Valley, which Stockton seeks to have declared its *exclusive preserve*, is through the Golden Gate to the Pacific Ocean. For almost a hundred years before Stockton was made accessible to oceangoing vessels, San Francisco was the principal port through which freight from the San Joaquin Valley would and did pass. It did not cease to be such a port merely upon the creation of an additional port at Stockton" (R. 1278).

The Commission further reviewed and adopted the findings of an investigation actually undertaken pursuant to Section 8 of the Merchant Marine Act, 1920, jointly by the Maritime Administration, Department of Commerce, and the Corps of Engineers, Department of the Army, the gov-

ernmental agencies charged with administering Section 8. Those findings were that the ports on San Francisco Bay and connecting waterways reached through the Golden Gate have overlapping and common tributary territories, all economically and naturally served by carriers serving any one of such ports. (R. 1280-81),[8]

All of the foregoing demonstrates that the Federal Maritime Commission gave full consideration to Section 8 of the Merchant Marine Act, 1920. Petitioner, accordingly, has no basis to complain that the Commission did not apply the policy of Congress as expressed in Section 8. What petitioner is really objecting to, but does not say so, is that the policy was not applied so as to produce a result favorable to Stockton. Even if it were assumed the Commission had an obligation to apply that policy, it is a matter entrusted to the discretion and expertise of the agency. A reviewing court may not substitute its own view for the judgment of the Commission in such a matter involving complex factual and legal questions as to which there is support in the record.

The fact that Stockton was developed with federal funds is also asserted as creating a Congressional policy which invalidates per se the Commission's approval of equalization within the same geographical harbor complex. (Pet.

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8. The Commission from examination of these studies determined:

> "It is obvious that these studies dictate a rejection of any 'constructive mileage' theory for determining 'naturally tributary territory.'
>
> "We conclude, that for the purposes of this proceeding, the territory naturally tributary to Stockton should properly be considered naturally tributary to San Francisco and other San Francisco Bay area ports. To paraphrase the *Beaumont* decision, *supra*, the territory surrounding Stockton and the entire Bay area is centrally, economically and naturally served by the conference facilities at San Francisco." (R. 1281)

pp. 10-11) Federal funds were also patently used to develop other ports and waterways within that harbor complex. This contention is answered convincingly in the concurring opinion of Commissioner Patterson:

> "The justification for public investment in port construction comes before, not after, the investment. The investment depends on commercial potentialities, not on future rights. Once made, the investment does not thereafter create legal rights to a flow of business or entitle anyone to anything, but only creates opportunities to exploit."[9] (R. 1321-22)

C. The Decision Below Has Only Local Significance.

The petition's assertion that the decision "affects every port in the United States and is highly important to every Port" (Pet., p. 13) is plainly not so. As demonstrated above, the decision was based on findings of fact related to the particular features of the San Francisco Bay Harbor Complex. There are few areas, if any, which have the same economic or geographic features as San Francisco Bay and its connecting waterways. The decision has no national significance. The principal port that it might affect other than petitioner is the Port of San Francisco which is opposing the petition. No ports at any time have intervened on behalf of petitioner.

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9. Commissioner Patterson goes on to point out that the ocean carriers had heretofore benefited Stockton by making their freight rates the same for Stockton as for San Francisco, saying:

> "It is not unjust that the rate equality is eliminated by the absorption of partial inland transporting costs because the carriers have only eliminated what they created in the first place. Nothing is taken away that Stockton was entitled to, such as values it created." (R. 1322)

D. The Method of Review Employed by the Court of Appeals Was Proper.

As a ground for granting the writ, petitioner contends that the court of appeals "did not discuss or even mention" petitioner's legal contentions as to Congressional policy and the necessity for application thereof (Pet., p. 6) and, hence, did not "decide all relevant questions of law" as required by Section 10(e) of the Administrative Procedure Act (5 U.S.C. 706).[10]

We know of no authority (and none is cited) that requires the court of appeals to discuss each question of law presented to it before it can decide that the conclusions of an administrative agency have "a reasonable basis in law". A proscription to "*decide* all relevant questions of law" is not a requirement to *discuss* anything.

The court of appeals made it quite clear why its opinion did not include detailed discussion of all issues. It had before it on review a 32-page Initial Decision of the Federal Maritime Commission's Presiding Examiner (R. 1232-1263), a 27-page majority opinion of the Federal Maritime Commission (R. 1266-1293), a 26-page concurring opinion by one of the Commissioners (R. 1306-1331), and a 7-page opinion by the dissenting Commissioner (R. 1293-1299). The court stated the Commission's report and opinion "fully set forth" the "facts, contentions of the parties, and the rulings of the Commission." (R. Vol. 1, pp. 4-5). In view of this, the court said, "We deemed it unnecessary therefore to recite these matters in the opinion of this court" (R. Vol. 1, p. 5). It was the expressed view of the court that "the

10. It would seem logical and appropriate that if a court of appeals failed to consider an important relevant point of law the party which raised it should call the omission to that court's attention by petition for reconsideration before seeking redress from the overburdened Supreme Court. This petitioner did not do.

very complete and elaborate decision of the Maritime Commission discloses that its conclusions do have warrant in the record, a reasonable basis in law, and are supported by substantial evidence" (R. Vol. 1, p. 6).

The court of appeals thus correctly applied the rules as to the scope of its review. It was not "a departure from the accepted and usual course of judicial proceedings" (Pet., p. 16) that the court did not recite in detail, as we have here, the Commission's factual findings and its consideration of mixed questions of fact and law in applying those facts and the policies of the Merchant Marine Act, 1920, to the objectives of the Shipping Act, 1916, to reach the conclusion that respondent's equalization rule was not invalid.

IV.

CONCLUSION

The foregoing amply demonstrates that the Petition for Certiorari is not well founded and should be denied.

Dated: March 15, 1967.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, EDWARD D. RANSOM, certify as follows:

I am a member of the Bar of the Supreme Court of the United States. I represent respondent Pacific Westbound

Conference and its member lines in the above-entitled matter, in whose behalf service of the foregoing Reply Brief has been effected as herein stated.

I certify that on or before March 15, 1967 I served the foregoing Brief of respondent Pacific Westbound Conference by service of three (3) copies upon the attorneys for petitioner, three (3) copies upon the Solicitor General of the United States, three (3) copies upon attorneys for the Federal Maritime Commission, and three (3) copies upon the attorneys for each of the other respondents, by mailing the same, postage prepaid, airmail to addressees in Washington, D. C. and first class mail to the other addresses, as follows:

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